Supreme Court, U.S.
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In The

Supreme Court of the United States

BRADLEY ROWLAND MARSHALL,

Petitioner,

v.

WASHINGTON STATE BAR ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a governmental unit can, through the use of a personal services agreement, convert a private entity, acting as an independent contractor, into a state instrumentality thereby entitling the private entity to claim a police and regulatory exception under 11 U.S.C. § 362(b)(4) of the Bankruptcy Code.

Whether a governmental unit, which undertakes governmental action in bad faith or in violation of the Due Process Clause of the Fourteenth Amendment, is entitled to claim an 11 U.S.C. § 362(b)(4) exception.

If actions undertaken by an entity are not exempted under 11 U.S.C. § 362(b)(4) of the Bankruptcy Code will this render an order by a state court void *ab initio*?

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OPINIONS BELOW

The Washington State Supreme Court issued its order to disbar petitioner on October 1, 2009, and its order denying reconsideration on December 23, 2009.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction under 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved include the Fourteenth Amendment, Art. VI, Clause 2, and Article 1, Section 8, Clause 4 to the United States Constitution, which provide as follows:

The Fourteenth Amendment:

Section 1, All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside, No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Art. VI, Clause 2, U.S. Const.:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Art. 1, Section 8, Clause 4, U.S. Const.:

Authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States." Congress has adopted the Bankruptcy Reform Act of 1978, codified in Title 11 of the United States Code and amended in 2005 as the BAPCPA.

STATEMENT OF THE CASE

On April 4, 2003, the Washington State Bar Association ("Bar" or "WSBA") and Jeffers Danielson Sonn & Alyward ("JDSA"), a private law firm and its employee, Mr. James M. Danielson ("Danielson") entered into a personal services agreement. The agreement called for Danielson, under a shareholder agreement of JDSA, to provide chief hearing officer services as an independent contractor of the Bar. Neither JDSA nor Danielson were employees of the Bar or a governmental unit or an instrumentality of the State. Neither Danielson nor his law firm received a delegation of authority or had an active, ongoing relationship nor were they created by or under the direction or control of the State.

On November 14, 2005, the Bar alleged that Bradley R. Marshall (petitioner) engaged in unprofessional conduct. JDSA, through its employee, James Danielson, conducted the private administrative proceedings.

On May 21, 2009, more than two years after JDSA issued its findings of fact, conclusions of law and recommendation for disbarment, petitioner filed for protection under Chapter 11 of the Bankruptcy Code. As of that date, the findings of fact, conclusions of law and recommendation were stayed pursuant to 11 U.S.C. § 362(a).

On June 4, 2009, the State Supreme Court and the Bar were duly notified by U.S. Mail and through the electronic filing system of petitioner's bankruptcy

filing. On October 1, 2009, nearly five months after notice of the bankruptcy filing had been served on the State Court and the Bar, the Court, without seeking or obtaining relief from stay, or conducting a hearing to determine if the private administrative hearing conducted by JDSA was exempted under § 362(b)(4), wrongfully utilized the stayed decision to issue an order revoking petitioner's law license. On October 20, 2009, petitioner filed a motion for reconsideration. On December 23, 2009, the Washington State Supreme Court affirmed its decision. This petition followed.

STATEMENT OF FACTS

Ms. Teena Killian (Killian) was selected by Mr. Danielson to serve as the volunteer hearing officer in a disciplinary case entitled *In re Eric C. Hoort*, Pub. File No. 04-00037. On January 12, 2005, while serving as hearing officer in *Hoort*, Ms. Killian secretly submitted an application for employment with the Bar. She was interviewed by the Director of Lawyer Discipline and offered the position of disciplinary counsel. Killian declined the Bar's offer of employment due to salary limitations, but rendered a decision to discipline Hoort and later filed her findings of facts, conclusions of law and recommendation for discipline with the Bar. No one, not Killian, not Danielson not the Director of Lawyer Discipline informed Hoort of what had occurred, while Killian was sitting in judgment of him. Killian

was not removed from the Bar's volunteer hearing officer list and no corrective actions were taken against her or the Director who conducted the job interview and made the employment offer.

On November 12, 2005, Disciplinary Counsel Scott Busby and Christine Gray, after taking the unusual step of naming the Bar as "grievant," filed a disciplinary complaint against petitioner.[1] On December 5, 2005, Danielson again called upon Killian to provide volunteer hearing officer services.[2] On May 26, 2006, Killian, while serving as hearing officer in petitioner's case, again secretly applied for employment with the Bar. She advised Anne Seidel, Director of Lawyer Discipline, in her letter of May 26th that she had long desired employment with the Bar and was currently serving as "[h]earing [e]xaminer in the case of In re Bradley R. Marshall Public File No. 05#00103". On June 1, 2006, Disciplinary Counsel Gray learned from Director Seidel that Killian was

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[1] Naming the Bar as "grievant" meant the Bar's Board of Governors were acting as "grievant" pursuant to Chapter 24.03 RCW.

[2] There are 66 volunteer hearing officers in Washington; the Bar's Board of Governors together with the Bar's Hearing Officer Selection Committee choose from the Bar's membership as to who will be placed on the Hearing Officers' List. Wash. Rules for Enforcement of Lawyer Conduct ("ELC") 2.5 Although ELC 2.11 permit the compensation of hearing officers and the chief hearing officer, the Board of Governors has made it a policy to not compensate any of the hearing officers because it would create an impermissible conflict of interest. which the Bar publicizes in its Bar News and on its website. The Bar's budget is derived from membership dues exclusively.

re-applying for a disciplinary position with their office. Gray immediately informed Busby. Since Gray and Busby were seeking permission to amend the complaint to add additional charges but needed a continuance because the hearing was scheduled to occur in 20 days, they used Killian's desire for employment with their office as an opportunity to obtain the continuance of the hearing and authorization to proceed with the amended complaint, adding counts 10-12, which became the primary basis for petitioner's disbarment. On June 1, 2006, Gray and Busby sent the scheduling order to Killian for her to sign, but they did not disclose to petitioner or his attorney that Killian was also seeking employment from their office. The following day, on June 2, 2006, Director Seidel wrote to Killian and acknowledged that she was the "[h]earing [o]fficer for the Bradley Marshall formal proceeding," indicated her mutual interest in having Killian apply for employment and agreed to arrange for an interview.[3] The same day, June 2, 2006, Killian received the proposed order for the amended complaint and the continuance from Busby and Gray; she signed it on June 2nd and returned it to the them on June 5, but still no one disclosed to petitioner or his attorney that Killian

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[3] A lawyer having knowledge of a violation of the Rules of Professional Conduct ***shall*** inform the appropriate professional authority. Rules for Professional Conduct ("RPC") 8.3, 8.4. This mandate includes hearing officers, ELC 2.6(3)(B), 2.10.

was conflicted because of her ongoing efforts to gain employment with the Bar.[4]

Twenty-seven days later, Gray disclosed to Mr. Kurt Bulmer, petitioner's attorney, what had occurred, but she refused to disclose what involvement the Bar had in the state of affairs and resisted all efforts of Mr. Bulmer to vacate the amended complaint. Mr. Bulmer wrote a letter to Chief Hearing Officer Danielson on June 29, 2006 to advise him regarding the Killian matter. He requested that the amended complaint be vacated, an impartial volunteer hearing officer be appointed, who had no knowledge of the Killian matter, and that an order be issued for the Bar to produce all communications with Killian. Although Killian was eventually removed from the case as hearing officer Busby and Gray achieved what they wanted, the continuance and the amended complaint.

Shortly thereafter, petitioner filed his amended answer, which raised constitutional issues regarding the conduct of Killian, Gray, Busby and Seidel and put the Bar on notice that petitioner would defend on the basis that the proceedings were inherently flawed. At paragraph 167, Mr. Bulmer alleged that "[r]espondent asserts and intends to defend on the

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[4] ELC 2.6(c) Hearing Officer's Duty To Avoid Impropriety and the Appearance of Impropriety. Hearing officers should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the disciplinary system.

basis that these proceedings are the result of the denial of due process, the denial of fundamental fairness and the violation of the equal protection. . . ."

A week or two thereafter the American Bar Association published its long awaited Report on Washington's Lawyer Regulatory System.[5] The Report identified internal problems within the system, including conflicts of interest, flaws in the structure, operation and control of the system and ultimately recommended that the disciplinary system be removed from the Bar and placed under the control of an independent State agency. The Washington State Supreme Court directed the Board of Governors (BOG) to examine the issues raised in the Report. The Bar's leadership hurriedly formed the Board of Governors Disciplinary Committee and several sub-committees and requested Danielson and his law partner, Mr. Stanley Bastian, to participate. Mr. Danielson had not disclosed that he had previously served as a Board of Governors member or that Mr. Bastian, his law partner, was currently a Board of Governors member who was then campaigning to become Bar President.[6] Mr. Bastian wrote on the JDSA website blog:

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[5] The American Bar Association August 2006 Report on Washington's Lawyer Regulatory System.

[6] Mr. Bastian's role as a Board of Governors member meant he was also acting as grievant in petitioner's case.

> In fact [attorney discipline] could be the most important duty of the bar association because we are the only self regulated profession in the state of Washington. Every other profession which requires a license is regulated by a state agency, such as the Department of Health or the Department of Labor and Industries. The WSBA has always prided itself on being the only self regulated profession in the state of Washington, but we will remain that way only if we maintain tough . . . standards of professionalism.

Mr. Bastian became the Washington State Bar Association President-Elect in the Summer of 2006.

On August 9, 2006, without acknowledging Mr. Bulmer's June 29, 2006 letter requesting an impartial volunteer hearing officer, who was without knowledge of the Killian matter, Mr. Danielson appointed himself as hearing officer. On August 10, Becky Crowley, Clerk to the Disciplinary Board, wrote a precautionary letter to Mr. Danielson regarding conflicts of interest and the importance of hearing officer impartiality, advising him to recuse himself if he was in conflict with respondent, disciplinary counsel, or any of the witnesses in the matter. Mr. Danielson ignored the cautionary letter and denied petitioner's requests for full discovery, issued sua sponte a protective order disallowing any disclosure of information regarding the misconduct of Killian, Seidel, Busby and Gray and refused to vacate the amended complaint, which Ms. Killian authorized when she was seeking employment from the Bar.

Mr. Danielson did not disclose to petitioner or his attorneys that: (1) he, Bastian and JDSA, were parties to a personal services contract with the Bar; (2) the Bar was paying him and JDSA $30,000 per year, plus expenses, to provide chief hearing officer services to the Bar; (3) he, Bastian and JDSA had a fiduciary duty of loyalty to the Bar; (4) the Bar had agreed to hold Danielson and JDSA harmless for any misconduct; (5) Bastian as a shareholder in JDSA was entitled to a portion of the fees paid by the Bar; and (6) the BOG invited him to participate on the BOG Committee and he accepted the invitation all in violation of the Rules for the Enforcement of Lawyer Conduct.[7]

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[7] ELC 2.6(e)(4) which states: (A) Hearing officers should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: (i) the hearing officer has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (ii) the hearing officer previously served as a lawyer or was a material witness in the matter in controversy, or a lawyer with whom the hearing officer previously practiced law served during such association as a lawyer concerning the matter or such lawyer has been a material witness concerning it; (iii) the hearing officer knows that, individually or as a fiduciary, the hearing officer or the hearing officer's spouse or member of the hearing officer's family residing in the hearing officer's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or is an officer, director or trustee of a party or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification;

(Continued on following page)

Despite ex parte communications and the obvious conflicts of interest his work on the Committee would cause, given his concurrent work as hearing officer, Mr. Danielson began attending BOG meetings with Robert Welden, the Bar's General Counsel, Anne Seidel, the Director of Lawyer Discipline, Paula Littlewood, the Bar's Executive Director, two State Supreme Court Justices, several disciplinary counsel members, including Mr. Busby, and a cadre of board members, including Mr. Bastian. Over an eight month period, from September 2006 through April 2007, the period in which petitioner's case was ongoing, Mr. Danielson collaborated with Bar officials on how provisions of the Rules for the Enforcement of Lawyer Conduct should be interpreted. These matters were at issue in petitioner's case. In his letter of February 18, 2009, Mr. Danielson confirms that his work on the Committee involved as much:

ELC 2.6(e)(5) requires:

> *Remittal of Disqualification:* A hearing officer disqualified by the terms of subsections (e)(4)(A)(iii) or (iv) may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the hearing officer's participation, all agree in writing or on the record that the hearing officer's relationship is immaterial or that the hearing officer's economic interest is *de minimis*, the hearing officer is no longer disqualified and may participate in the proceeding. When a party is not immediately available, the hearing officer may proceed on the assurance of the lawyer that the party's consent will be subsequently given.

> I was appointed to serve on a task force considering the overall operation of the attorney discipline system in the state of Washington that involved an extensive review of the ELCs adopted by the Supreme Court in 2002. It was my understanding that because I have dealt with the ELCs probably more than any other lawyer in the state since their adoption by the Supreme Court, I was in a position to make constructive suggestions. . . .

Even after Mr. Danielson appointed himself as hearing officer and failed to disclose his conflicts of interest, petitioner and his attorneys made numerous written requests for such information, but Mr. Danielson, Mr. Welden and Mr. Busby refused to make proper disclosure:

1. On August 31, 2006, petitioner wrote to Mr. Welden to learn if Mr. Robert Scales, who served as hearing officer in a prior case involving petitioner, had sought or obtained employment with the Bar, while he served as hearing officer. Mr. Welden responded in a letter dated September 10, 2006 to petitioner (and copied to petitioner's attorneys Mr. Bulmer and Mr. Philip Talmadge), wherein he claimed that the Bylaws of the Board of Governors precluded him from releasing information regarding employment applications by hearing officers.[8] Mr.

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[8] It should be noted that the Board of Governors was acting as grievant in this case; the Rules for Enforcement of Lawyer

(Continued on following page)

Welden knew that petitioner and his attorneys sought the information for the purpose of determining if petitioner's due process right to an impartial hearing officer had been violated.[9] He knew that the investigation was not limited to Mr. Scales; and he knew Mr. Danielson was in an impermissible conflict of interest relationship. Mr. Welden had negotiated the personal services agreement with Mr. Danielson and JDSA and it was he who was making the monthly payments to JDSA out of the Office of General Counsel's annual budget.[10] Yet, Mr. Welden made no disclosure to petitioner or his attorneys.

2. Mr. Talmadge wrote to Mr. Danielson on November 22, 2006 to request permission to contact Mr. Scales for the purpose of ascertaining if he, like Killian, had sought or gained employment from the Bar while he served as hearing officer in petitioner's case. The letter was copied to Gray, Busby and Bulmer and specifically stated that petitioner and his attorneys were concerned "that no similar employment application was filed. . . ." Mr. Danielson knew the purpose of the letter; he knew that he had a duty

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Conduct require a grievant to provide all information that may be relevant to a grievance ELC 5.1.

[9] A lawyer having knowledge of a violation of the Rules of Professional Conduct ***shall*** inform the appropriate professional authority. RPC 8.3, 8.4. This mandate includes hearing officers, ELC 2.6(3)(B), 2.10.

[10] WSBA Office of General Counsel's 2006/2007 Annual Budget.

to disclose his contractual relationship with the Bar to petitioner and his attorneys, but he refused to do so and did not acknowledge the letter or Mr. Talmadge's request for a response.

3. In December 2006, Mr. Bulmer propounded discovery requests upon the Bar and Ms. Killian. The discovery sought information that would have undoubtedly led to the revelation of Mr. Danielson's conflicts of interest, but the Bar vigorously opposed it, obtained a declaration from Mr. Welden, who again cited the Board of Governors' Bylaws regarding the release of such information, and Mr. Danielson naturally denied the discovery requests and quashed the subpoenas of Killian and the Bar's Records Custodian.

4. On December 12, 2006, Mr. Talmadge wrote directly to Mr. Scales to ask if he had sought employment with the Bar. The letter was copied to Mr. Busby and Mr. Bulmer. On December 29, 2006, Mr. Busby wrote to Mr. Scales and copied Mr. Talmadge. Mr. Busby's letter stated that although the Bar's Bylaws precluded him from disclosing the information requested by Mr. Talmadge, Mr. Scales was free to make the disclosure. However, Mr. Busby did not send a similar letter to Mr. Danielson (in response to Mr. Talmadge's letter) to advise him that he was free to reveal his contractual relationship with the Bar. Mr. Busby and Ms. Gray apparently were not precluded by the Bylaws from making a delayed disclosure of Killian's efforts to gain Bar employment in petitioner's case, but were strangely precluded

from disclosing the Bar's offer of employment to Ms. Killian in Mr. Hoort's case.

SUMMARY OF THE ARGUMENT

A governmental unit cannot convert a private entity into a state instrumentality by a personal services agreement, thereby entitling the private entity to claim an 11 U.S.C. § 362(b)(4) exception to the automatic stay of the Bankruptcy Code. Any entity which undertakes governmental action in bad faith or in violation of the Due Process Clause of the Fourteenth Amendment is not entitled to claim an 11 U.S.C. § 362(b)(4) exception to the automatic stay of the Bankruptcy Code and a state order issued in violation of the automatic bankruptcy stay is void *ab initio*. *Kalb v. Feuerstein*, 308 U.S. 433 (1940). See *Wade v. State Bar of Arizona*, 948 F.2d 1122 (9th Cir. 1991); *In re Hucke*, 992 F.2d 950, 953 (9th Cir. 1993); *In re Stringer v. Huett*, 847 F.2d 549 (9th Cir. 1988); *In re Shamblin*, 890 F.2d 123 (9th Cir. 1989); *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353, 41 S. Ct. 116, 65 L. Ed. 297 (1920); *In re Gruntz*, 202 F.3d 1074, 35 Bankr.Ct.Dec. (CRR) 160, 43 Collier Bankr.Cas.2d (MB) 921, Bankr.L.Rep. (CCH) P 78102 (9th Cir. 2000).

REASONS TO GRANT PETITION

1. A GOVERNMENTAL UNIT CANNOT CONVERT A PRIVATE ENTITY INTO A STATE INSTRUMENTALITY BY USE OF A PERSONAL SERVICES AGREEMENT THEREBY ENTITLING THE PRIVATE ENTITY TO CLAIM AN 11 U.S.C. § 362(b)(4) EXCEPTION TO THE AUTOMATIC STAY OF THE BANKRUPTCY CODE.

Section 362(a) of the U.S. Bankruptcy Code provides that the filing of a bankruptcy petition automatically stays the commencement of judicial or administrative actions against a debtor that were or could have been initiated before the commencement of the case under Title 11. In order for the private administrative actions of JDSA to have had a continuing effect, relief from stay was necessary because JDSA was not a governmental unit or an instrumentality of the State and said actions were not exempted under 11 U.S.C. § 362(b)(4). Under the 2005 Amendment to the Bankruptcy Code, a § 362(b)(4) exception applies exclusively to a "governmental unit" or "instrumentality" acting under its police or regulatory powers. A governmental unit is defined pursuant to 11 U.S.C. § 101(27): "[t]he term governmental unit means . . . department, agency, or instrumentality of . . . a State . . . government." According to 11 U.S.C. § 101(41) "[t]he term 'person' includes individual, partnership, and corporation, but does not include governmental unit." Therefore Danielson, as a person, could not be defined as a governmental unit or

instrumentality of the State Supreme Court. The legislative history of section 101(27) states that

> [d]epartment, agency, or instrumentality does not include entities that owe their existence to state action such as the granting of a charter or a license but that have no other connection with a state government. The relationship must be an active one in which the department, agency, or instrumentality is actually carrying out some governmental function.

Congress' use of the word "instrumentality" in the legislative history was intended to convey that an entity must be a subsidiary or organ of state government and created for a special purpose. 11 U.S.C. § 101(27). JDSA was not created for a special purpose.

In the context of an attorney disciplinary matter, the United States Court of Appeals for the Ninth Circuit has handed down the leading case in *Wade v. State Bar of Arizona*, 948 F.2d 1122 (9th Cir. 1991), which sets forth the criterion for analyzing whether an entity, in that case, the State Bar of Arizona, was an "instrumentality" of the Arizona Supreme Court within the meaning of § 362(b)(4). The Court in *Wade* found that the Arizona State Bar was an "instrumentality" of the Arizona Supreme Court because (1) the Bar existed by virtue of a rule promulgated by the Arizona Supreme Court; (2) the State Court delegated its regulatory authority to the Bar; (3) the Bar exercised its delegated authority under the "direction and control" of the State Court; and (4) the

relationship between the State Court and the Bar was an active one. JDSA cannot claim that it meets the Wade test for several important reasons: (1) JDSA has not received any delegation of authority from the legislative, executive or judicial branches of Washington State government; (2) JDSA owes its existence to a state license, which according to federal legislative history will not suffice for governmental unit status, see 11 U.S.C. § 101(27); (3) JDSA did not share an active relationship with the State; and (4) the State did not exercise "direction and control" over JDSA. See *Wade v. State Bar of Arizona*, 948 F.2d 1122, 1124 (9th Cir. 1991).

Under the April 4, 2003 personal services agreement, JDSA and Danielson were designated as independent contractors and "not employee[s]" of the Bar. The personal services contract stated that all work performed by Danielson was the work of JDSA and any compensation received was the property of JDSA. The Bar was required to indemnify and hold JDSA and its shareholders harmless. The firm was to be reimbursed for all reasonable expenses for Danielson to complete his work as chief hearing officer. Neither the State Court nor the Bar had control of how Danielson performed his duties because he was an employee of JDSA and the agreement specifically called for him to serve as an independent contractor.[11] Of the four factors

[11] "[An] independent contractor is a person who contracts with another to do something for him who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.

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mentioned by *Wade*, direction and control of an instrumentality by government is the most important. In this case, direction and control by the State was non-existent. In fact, the agreement did not require the Bar to provide any control or direction. There was no standard of care, no policies or procedures and no supervision. As an independent contractor, Danielson was entitled to control the method, the manner and the means by which chief hearing officer services were provided. This absence of control and direction is exactly what Congress did not intend; it is what allowed Danielson and Killian to repeatedly engage in impermissible conflicts of interest without corrective action. The Chief Hearing Officer was allowed to select any one of the 66 volunteers to serve as hearing officer in any given case; he was not required to use a random or rotational selection method; there were no rules that forbid him from selecting a single hearing officer as many times as he chose. He selected Killian after he knew or should have known that she engaged in misconduct by seeking Bar employment on two occasions without disqualification, disclosure or

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Restatement (Second) of Agency § 2(3)." The Court in *Kamla v. Space Needle Corp.*, 147 Wn.2d 14, 52 P.3d 472, (2002) explained that "an independent contractor controls the manner, the method, the timing and is free to use his own process and procedures without being subject to control by the one to whom he has a relationship. It is the independent contractor who chooses the means by which the result is to be accomplished." See also *Swan v. Aetna Life Ins. Co. of Hartford, Conn.*, 155 Wash. 402 (1930); *Carlson v. P. F. Collier & Son Corp.*, 190 Wash. 301 67 P.2d 842 (1937).

consent. He then selected himself as hearing officer in the face of Killian's disqualification. This was possible because he was not required to answer to anyone. The State and the Bar failed to monitor his actions. The contract did not allow it and the ELCs were wholly deficient as to human oversight and basic fundamental accountability.

2. CONGRESS DID NOT INTEND FOR GOVERNMENTAL UNITS TO POSSESS THE POWER TO CONVERT A PRIVATE ENTITY INTO AN INSTRUMENTALITY OF THE STATE BY USE OF A PERSONAL SERVICES CONTRACT.

The Arizona State Bar in Wade petitioned the bankruptcy court for relief from stay in advance of any disciplinary proceedings. The Arizona State Bar acknowledged that it was not a governmental unit in every instance, but persuasively argued that the disciplinary office of the bar met the test because of creation, delegation, an active relationship and direction and control by the Arizona Supreme Court. The Arizona State Bar in Wade did not contract with an independent contractor to serve as the chief hearing officer and did not allow an independent conflicted contractor to control the disciplinary proceedings. If courts allow state bar associations or any state instrumentality to exempt the actions of a private entity through a personal services agreement, a pandora's box will be opened for every private corporation that happens to do business with a governmental unit.

The mere fact that a private corporation conducts its business under a contract with an instrumentality of the state does not also make the private entity an instrumentality of the state. *Fidelity & Deposit Co. v. Pennsylvania*, 240 U.S. 319, 36 S. Ct. 298 (1916). See also *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 23, 54 S. Ct. 267, 269 (1916); *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U.S. 375, 25 S. Ct. 50, 49 L. Ed. 242 (1904); *Broad River Power Co. v. Query*, 288 U.S. 178, 180, 53 S. Ct. 326, 327 (1933); *James v. Dravo Contracting Co.*, 302 U.S. 134, 149, 58 S. Ct. 208, 216, 114 A.L.R. 318 (1937); *Buckstaff Bath House Co. v. McKinley*, 308 U.S. 358 (1939). If courts expand the police and regulatory exception to private entities and persons, it will, in effect, limit Congress's power to regulate the bounds of a bankruptcy stay and a private company simply because a quasi-governmental entity, like a bar association, could extend the police and regulatory power exception reserved for state government by contracting with a private person or entity to serve as an independent contractor. This could radically alter the nature of police and regulatory power and the requirements of seeking relief from stay. It would be an affront to bankruptcy courts and to state governments if an "instrumentality" of a state could pick and choose which private entities should receive the b(4) exception and which do not. Congress intended a state to create the entity, delegate its power to it, maintain a close relationship and provide direction and control. By this, Congress could be

assured that the wayward actions of a private entity would be non-existent or less likely to occur.

Governmental unit status must also be determined by more than the actions undertaken otherwise the flood gates for (b)(4) protection will be flung wide open. It is the identity, rather than the role, that determines if an entity is a governmental unit or instrumentality of the state for purposes of the (b)(4) exception. In *In re Colin Hochstin Co.*, 41 B.R. 322 (Bankr. S.D. N.Y. 1984) the court refused to classify the New York Stock Exchange as a governmental unit. The Exchange argued for protection under section 362(b)(4) because its regulations protect the "national public interest." The court held that (b)(4) was inapplicable because the exception is limited to "actual governmental groups and not organizations acting in a governmental capacity." Similarly, courts have refused to extend the (b)(4) exception to include non-governmental units acting as private attorney generals. See *Revere Copper & Brass v. Hudson River Sloop Clearwater, Inc.*, 29 B.R. 584 (1983); *In re J.J. Bradley & Co.*, 6 B.R. 529, 538 (Bankr. E.D. N.Y. 1980) (*National Association of Securities. In re Chateaugay*, 118 B.R. 10, 22 (Bankr. S.D. N.Y. 1990) (Governmental unit exception to automatic stay does not apply to private citizen group). *In re Riley*, 142 Ariz. 604, 691 P.2d 695 (1984) and *Drummond v. Stahl*, 127 Ariz. 122, 126, 618 P.2d 616 (Ct. App. 1980).

3. CONGRESS INTENDED BANKRUPTCY COURTS TO PROTECT A DEBTORS' PROPERTY FROM BAD FAITH STATE PROCEEDINGS.

A right to practice law is a property right and as a property right it is protected by the Due Process Clause of the United States Constitution. In *Cleveland v. United States*, 531 U.S. 12, 25, n. 4 (2000) the Court stated: "[W]e have held that individuals have constitutionally protected property interests in state-issued licenses essential to pursuing an occupation or livelihood"). See also *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957). The power of a court to disbar or otherwise discipline an attorney must be exercised in conformity with the Constitution of the United States. *In re Poole*, 222 F.3d 618, 620 (9th Cir. 2000).

In re National Hospital and Institutional Builders Co., 658 F.2d 39, 43 (2d Cir. 1981), the court held that Congress intended bankruptcy courts to protect a debtor's property from bad faith state proceedings:

> The Constitution authorizes Congress to establish uniform laws of bankruptcy, U.S. Const. Art. I, § 8, and it establishes that laws passed pursuant to the Constitution are the supreme law of the land, U.S. Const. Art. VI. Those grants of authority surely include the power to thwart bad faith frustration of federal bankruptcy policy.

Bad faith means more than an erroneous determination of law or fact. Rather, the party alleging bad

faith must show, for example, that the state forum is biased and violates the Due Process Clause of the Fourteenth Amendment. The court in National Hospital provided a litany of examples where the government acted: "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence or paragraph, and in whatever manner and against whomever an effort might be made to apply it," *Younger v. Harris*, 401 U.S. 37, 53-54, 91 S. Ct. 746, 754-755, 27 L. Ed. 2d 669 (1971); that the state forum is biased, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973); see *McCune v. Frank*, 521 F.2d 1152, 1158 (2d Cir. 1975); that the City acted in wilful disregard of the law; that City officials clearly abused their discretion in initiating proceedings against the trustee; or that the "state proceeding (was) motivated by a desire to harass," *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611, 95 S. Ct. 1200, 1212, 43 L. Ed. 2d 482 (1975), by ill will, or by any other improper motivation, cf. *Central Avenue News, Inc. v. City of Minot*, 651 F.2d 565 (8th Cir. 1981) and *Eagle Books, Inc. v. Reinhard*, 418 F. Supp. 345, 351 (N.D. Ill. 1976), vacated on other grounds, 432 U.S. 902, 97 S. Ct. 2942, 53 L. Ed. 2d 1073 (1977) ("The gravamen of bad faith prosecution is the lack of a reasonable expectation that valid convictions will result")." *Caperton v. Massey Coal Co. Inc. et al.*, 129 S. Ct. 2252 (2009); *Peters v. Kiff*, 407 U.S. 493, 502 (1972). ELC 2.6(e)(4), (5).

In *In re Schlesinger*, 404 Pa. 584, 172 A.2d 835 (1961), the Pennsylvania Supreme Court ruled that a Pennsylvania Bar Association violated an attorney's constitutional right to a fair and impartial hearing

because the system was structured and functioned improperly. In that case, the functions of prosecutor, judge and jury were combined in one body, the Committee on Offenses, which lodged the complaint, prosecuted the complaint, and adjudicated the charge. In 1927, the U.S. Supreme Court held "that every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 773 U.S. 510, 532 (1927). The record in the instant case plainly discloses that the Washington State Supreme Court approved of a disciplinary procedure wherein the Bar acted as a party to the proceedings, naming itself as "Grievant"; acted as Review Committee, determining probable cause; acted as Disciplinary Counsel, prosecuting the Bar's grievance against the petitioner, before its own paid Chief Hearing Officer which, as judge, presided over the hearing, passed upon the credibility of the witnesses, determined the inferences to be drawn from their testimony, and deduced there from the "facts" which he found. The Bar, as Disciplinary Board, acted as review tribunal, upholding the hearing officer's recommendation. Such a procedure, so contrary to traditional American jurisprudence, is fundamentally flawed and deprived the petitioner of the "fair" hearing to which due process of law entitled him. *Caperton v. Massey Coal Co. Inc. et al.*, 129 S. Ct. 2252 (2009).

In 1992, the American Bar Association issued its *Report of the Commission on Evaluation of Disciplinary Enforcement* ("McKay") Report (1992) otherwise known as the "McKay Report". The McKay Report found in Recommendation 5 that

> [a]ll jurisdictions should structure their lawyer disciplinary systems so that disciplinary officials are appointed by the highest court of the jurisdiction or by other disciplinary officials who are appointed by the Court. Elected bar officials, their appointees and employees should provide only administrative and other services for the disciplinary system that support the operation of the system without impairing the independence of disciplinary officials. Elected officials, their appointees and employees should have no involvement in the adjudication and prosecution.[12]

In Washington, unlike the Arizona State Bar in *Wade*, elected members of the Board of Governors control nearly every aspect of the disciplinary system; they

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[12] Since 1993, the American Bar Association ("ABA") has called on the State of Washington to restructure its flawed disciplinary system, separating it from the Bar and creating a State independent administrative oversight committee in place of the Board of Governors. This was reiterated by the ABA again in the 2006 Report criticizing Washington's attorney discipline process. The 2006 ABA Report called for hearing officers, review committees and the Disciplinary Board to be subject to oversight by a State independent administrative committee, while disciplinary counsel would be subject to primary oversight by the Washington State Supreme Court. *Id.* pp. 19-22.

select the Chief Hearing Officer, the Hearing Officers, the Review Committee members, the Disciplinary Board members and oversee the work of Disciplinary Counsel. See ELC 2.1, 2.2, 2.3, 2.5 and 2.8. Their appointees and employees handled the investigative, prosecutorial, and adjudicative functions in the disciplinary process. The ABA stated at paragraph 5 of page 17 of its August 2006 Report on Washington's disciplinary system:

> when elected bar officials control all or parts of the disciplinary process, the appearance of impropriety or conflicts of interest is created, regardless of the actual fairness of the system. This is true whether the bar is unified or not. Implementing this recommendation (recommendation 1) [which is the removal of the disciplinary system from the WSBA] will assure the public that the disciplinary agency is an independent agency functioning directly under the Supreme Court. . . .

Petitioner's case involved, from the very onset, issues that brought into view a structurally and operationally dysfunctional disciplinary system and conduct that was "flagrantly and patently violative of express constitutional prohibitions."[13] There was

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[13] According to the 2006 ABA Report, hearing officers, disciplinary board members and Bar prosecutors tend to identify with and advocate for the Bar; hearing officers use Bar letterhead for correspondence and Bar pleading paper for pleadings; and hearing officers appear to have difficulty in relinquishing the role of advocate and acting as a judge; *Id.* The Report urged the Bar to require hearing officers to undertake

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Danielson's appointment of Killian as a volunteer hearing officer in petitioner's case when he knew or should have known that she recommended Hoort's discipline at a time when she surreptitiously sought and was offered employment by the Bar; there were the two employment interviews with the Bar's Director of Lawyer Discipline without disclosure or corrective action; there was the undisclosed scheme by Disciplinary Counsel Busby and Gray to obtain an amended complaint (just 20 days before the scheduled hearing) from Killian who they knew had previously applied and was again seeking employment from their office; and there was Chief Hearing Officer Danielson who concealed from petitioner his fiduciary duty of loyalty to the Bar,[14] his personal

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"mandatory" and "in-depth" training to "increase the quality of the hearing officers' reports and recommendations and enhance consistency in their recommendations". *Id.* Due Process is violated when hearing officers are inexperienced, under-trained, advocates for the Bar and when the Washington State Supreme Court repeatedly states that it "gives considerable weight to the hearing officer's findings of fact". *In re Disciplinary Proceeding Against Miller*, 95 Wn.2d 453, 457, 625 P.2d 701 (1981)); *Poole*, 156 Wn.2d 196, 212, 125 P.3d 954 (2006); *In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 133, 94 P.3d 939 (2004).

[14] A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust;

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services contract with the Bar,[15] his hold harmless agreement with the Bar, his $30,000 annual salary

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> he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed.

Deborah A. DeMott, *Beyond Metaphor An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 882 (1988).

[15] ELC 2.6(e)(4) which states: (A) Hearing officers should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: (i) the hearing officer has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (ii) the hearing officer previously served as a lawyer or was a material witness in the matter in controversy, or a lawyer with whom the hearing officer previously practiced law served during such association as a lawyer concerning the matter or such lawyer has been a material witness concerning it; (iii) the hearing officer knows that, individually or as a fiduciary, the hearing officer or the hearing officer's spouse or member of the hearing officer's family residing in the hearing officer's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or is an officer, director or trustee of a party or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification;

ELC 2.6(e)(5) requires:

> *Remittal of Disqualification:* A hearing officer disqualified by the terms of subsections (e)(4)(A)(iii) or (iv) may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the hearing officer's participation, all agree in writing or on the record that the hearing officer's relationship is immaterial or that the hearing officer's economic interest is *de minimis*, the hearing officer is no longer disqualified and

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for part time work with the Bar, part of which was indirectly returned to his law partner, a member of the Board of Governors and President-Elect of the Bar, whom Danielson signed the contract with. There was his failure to vacate the amended complaint which Killian authorized at a time when she was having ongoing communications with the Bar regarding employment. There was his acceptance of an appointment to the Bar's Disciplinary Committee all while he refused to allow discovery or answer questions posed by petitioner's attorneys that would have uncovered his own conflicts of interest and the extent of the Bar's bad faith. There was Robert Welden, the Bar's General Counsel who together with Busby and Gray, refused to report Mr. Danielson's conflicts of interest and the misconduct of Seidel when he knew the Rules of Lawyer Enforcement required him to do so; and when he was contacted by petitioner, with a legitimate request for information, that would have revealed the gravity of the Bar's misconduct, he refused to provide the information to petitioner and claimed that the Association's Bylaws disallowed such disclosure.

The Washington State Supreme Court in *In re the Disciplinary Proceeding Against Richard B. Sanders,* 159 Wn.2d 517, 145 P.3d 1208 (2006), held

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may participate in the proceeding. When a party is not immediately available, the hearing officer may proceed on the assurance of the lawyer that the party's consent will be subsequently given.

that one of its Justices violated the Due Process Clause of the Fourteenth Amendment and the Canons of Judicial Conduct by failing to recuse after he visited a prison and conversed with prisoners informally regarding issues that related to their individual cases:

> [I]n deciding recusal matters, actual prejudice is not the standard. The [Commission] recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating. . . . The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the facts.

In *Chicago, M., St. P. & Pac. R.R. v. State Human Rights Comm'n,* 87 Wn.2d 802, 557 P.2d 307 (1976), the Washington State Supreme Court found that an impermissible conflict of interest existed because one of the tribunal members, Susan Ammeter, had a job application pending with the Commission during the time period the tribunal was processing and deciding the case. *Id.* at 806. The Washington State Supreme Court pointed out in that case that the application by one of the tribunal's members created an impermissible conflict of interest and that one acting in a judicial capacity "must avoid even mere suspicion of irregularity or appearance of bias or prejudice."

In the present case, the Washington State Supreme Court ignored controlling case law and wide

reaching and sustained bad faith conduct within the disciplinary system and concluded that Mr. Danielson could participate in this case consistent with the requirements of due process. That decision cannot be squared with the State Supreme Court's own case precedent and certainly not with this Court's repeated admonition that in order to foreclose the possibility of actual judicial bias, an adjudicator "must avoid even the appearance of bias." *Withrow v. Larkin,* 421 U.S. 35, 47 (1975). *See id.* at 2259-61 (*citing Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986)); *Gibson v. Berryhill,* 411 U.S. 564 (1973); *Ward v. Village of Monroeville,* 409 U.S. 57 (1972); *Commonwealth Coatings Corp. v. Cont'l Cas. Co.,* 393 U.S. 145, 150 (1968); *In re Murchison,* 349 U.S. 133, 136 (1955); *Caperton v. Massey Coal Co. Inc. et al.,* 556 U.S. (2009). ELC 2.6(e)(4)&(5), the CJC 2, 3.

4. GUIDANCE IS NEEDED AMONG THE CIRCUITS IN HOW VIOLATIONS OF THE BANKRUPTCY STAY SHOULD BE TREATED.

The First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits all presently hold that actions in violation of the automatic stay are void *ab initio.* The courts that have adopted this approach derive their authority from *Kalb v. Feuerstein,* 308 U.S. 433 (1940). This Court voided actions under the Frazier-Lemke Act by mortgagees conducting a foreclosure sale, because the mortgagees failed to obtain relief from the stay. If a violation is declared void the burden of validating the creditor's

action is on the creditor. Donna Renee Tobar, *The Need for a Uniform Void Ab Initio Standard for Violations of the Automatic Stay*, 24 Whittier L. Rev. 3, 23 (2002); *Kalb v. Feuerstein*, 308 U.S. 433 (1940). The Fifth Circuit and the federal circuits are the only circuits that still hold actions taken in violation of the automatic stay as merely voidable upon the request of the debtor. This places a heavy burden on the petitioner to challenge and prosecute the violations, which is a contradiction to the intended purpose of the automatic stay: to stop all proceedings against the debtor to allow them a breathing spell. Just like the void approach, a court validating or voiding a violation of the stay will look to the parties behavior, and their knowledge of the bankruptcy proceeding. 24 Whittier L. Rev. at 25, 51-52. *Id.*; see *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1989); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989); *Bronson v. U.S.*, 46 F.3d 573, 578 (Fed. Cir. 1995).

CONCLUSION

Petitioner asks the Court to take this opportunity to provide leadership to bar associations, disciplinary agencies, to state and bankruptcy courts throughout the union on the proper role of non-governmental units in lawyer disciplinary matters where a respondent attorney has filed for protection under the Bankruptcy Code. Petitioner also asks the Court to guide state and bankruptcy courts on whether the

§ 362(b)(4) exception is available when governmental actions are undertaken in bad faith or in violation of the Due Process Clause of the Fourteenth Amendment. This Court should reverse and find that the order of the State court is void *ab initio*.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against BRADLEY R. MARSHALL, Attorney at Law.	No. 200,577-2 En Banc Filed OCT 01 2009

J.M. JOHNSON, J. – In 2006, the Washington State Bar Association (WSBA) charged Bradley R. Marshall with 12 counts of violating the Rules of Professional Conduct. Mr. Marshall has been the subject of three prior disciplinary actions. In the present disciplinary action, the hearing officer made over 175 findings of fact in addition to conclusions of law relating to each charged count of misconduct. The hearing officer recommended that Mr. Marshall be disbarred, and the Disciplinary Board (Board) unanimously agreed.

We have elected to follow the recommendation of the unanimous Board and disbar Mr. Marshall. Mr. Marshall committed a number of different violations, which individually would have warranted disbarment. These violations include demands for additional fees to continue a lawsuit that was paid for on a flat fee basis, filing a lawsuit and a lien against a client who refused to pay him additional fees, a deceptive attempt to compel settlement, failure to obtain consent for a conflict of client interest, and other deceptive practices. These facts are

accompanied by multiple aggravating factors, including prior discipline for similar conduct. Taking these violations together, Mr. Marshall fails to present us with a reason to depart from the recommendation of the hearing officer and Board.

FACTS[1]

Beginning in October of 2000, Mr. Marshall agreed to represent Callie Rheubottom and Essie Wormack in bringing a lawsuit against the Prince Hall Grand Chapter Order of the Eastern Star (Grand Chapter). Mrs. Rheubottom and Mrs. Wormack were former members of the Grand Chapter.

Flat Fee Agreements and Conflict of Interest

On October 4, 2000, Mr. Marshall sent written fee agreements to Mrs. Rheubottom and Mrs. Wormack. The agreement was for joint representation for a flat "non-refundable fee" of $15,000. Ex. 3. The

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[1] We have limited the facts, conclusions of law, and discussion of sanctions to those dealing with violations serious enough to warrant disbarment. As we find the facts before us to be sufficient to disbar Mr. Marshall, we need not review the other charged counts where the hearing officer recommended a sanction less than disbarment. *See In re Disciplinary Proceeding Against Petersen*, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993) (the "'ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct . . . '") (quoting Am. Bar Ass'n, *Standards for Imposing Lawyer Sanctions* 6 (1986)).

purpose of the arrangement was "to pursue a claim for breach of contract, tortuous conduct and related claims" against the Grand Chapter and Patricia Simpson, one of the officers of the Grand Chapter.[2] *Id.* On January 9, 2001, Mr. Marshall filed a lawsuit against the Grand Chapter and Patricia Simpson on behalf of Mrs. Rheubottom and Mrs. Wormack (the Rheubottom litigation).

In February of 2001, Mr. Marshall agreed to represent Lorraine Harris, another former member of the Grand Chapter. He joined her as a plaintiff in the Rheubottom litigation via amended complaint. Mrs. Harris paid Mr. Marshall a $7,500 flat fee for representing her. However, Mrs. Wormack had previously objected both orally and in writing to adding Mrs. Harris in the Rheubottom litigation because Mrs. Harris had different goals in suing the Grand Chapter. Mr. Marshall did not advise any client in writing about the conflict or obtain a written waiver.

On May 8, 2001, the Grand Chapter filed an answer and included counterclaims against all three plaintiffs. Additionally, the Grand Chapter filed a third party complaint against Lindia Richard[3],

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[2] Patricia's husband was also included in the lawsuit.

[3] Lindia Richard had filed a separate lawsuit against the Grand Chapter and was represented by a different attorney. In June 2002, Mr. Marshall agreed to represent Mrs. Richard as well. However, Mr. Marshall's agreement with Mrs. Richard provided for an hourly fee of $175. Mr. Marshall did not explain

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William Rheubottom (Callie Rheubottom's husband) and Bert Harris (Lorraine Harris' husband). These third parties were all former members of the Grand Chapter.

The Grand Chapter had also brought a lawsuit against several defendants, including each of the above mentioned parties (the Grand Chapter litigation).[4] In May of 2001, Mr. Marshall agreed to represent Mr. Rheubottom and Mr. Harris in the Rheubottom litigation and the Grand Chapter litigation, receiving a flat fee payment from both men totaling $19,000. Mr. Marshall did not obtain consent in writing from any of his clients concerning the potential conflict of interest. On May 29, 2001, Mr. Marshall filed an answer on behalf of each of his clients to the counterclaims and third party complaint in the Rheubottom litigation. All relevant lawsuits were consolidated as of December 2001 (consolidated litigation).

Settlement Negotiations and Additional Fee Demands

In April 2002, Mr. Marshall negotiated a settlement on behalf of Mrs. Rheubottom, Mrs. Wormack,

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to his other clients the implications of adding Mrs. Richard to the case, nor did he get a waiver.

[4] Initially, Mrs. Wormack and Mrs. Richard were not included as defendants in the Grand Chapter litigation. They were added in May 2001.

and Mrs. Harris as to the two individual defendants named in the consolidated litigation. Mrs. Rheubottom, Mrs. Wormack, and Mrs. Harris each were to be paid $12,500. The money was paid and deposited into Mr. Marshall's trust account. The settlement did not include the third defendant, the Grand Chapter.

On June 3, 2002, at a mediation proceeding, the Grand Chapter attempted to reach a settlement resolving all pending claims in the consolidated litigation. As a result of the mediation, counsel for the Grand Chapter, Mr. Marshall, the mediation judge, and some, if not all, of the clients thought settlement had been reached. However, no written settlement agreement was signed by any of the clients, no written stipulation was executed, and shortly after the mediation, all clients confirmed to Mr. Marshall that they had not agreed to a settlement.

With the earlier settlement proceeds still in his trust account, Mr. Marshall informed each of the clients that they would have to pay him additional fees if they wanted to continue to pursue their claims against the Grand Chapter.[5] Mr. and Mrs. Rheubottom paid Mr. Marshall $15,000 in additional fees for his continued representation. Mrs. Wormack and Mrs. Harris refused to pay additional fees,

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[5] Mr. Marshall admitted in his pleadings that he demanded additional fees at this point. But at the hearing, he testified that it was not additional fees, but rather an additional deposit against costs, that he was demanding. The hearing officer found Mr. Marshall to be not credible.

arguing their agreement was for a flat fee that they had already paid.[6]

By letter dated June 17, 2002, Mr. Marshall attempted to get Mrs. Wormack and Mrs. Harris to settle with the Grand Chapter. Ex. 42. Referring to the settlement negotiations, he wrote, "The court has directed Ms. Wormack and Ms. Harris sign the release and settlement agreement and the [Grand] Chapter to do the same in order to consummate this matter." *Id.* Mr. Marshall enclosed the release documents for signature. However, the letter statement was not true; the court had not directed Mrs. Wormack or Mrs. Harris to sign the release and settlement agreement.

Mrs. Wormack did not sign the release and indicated by letter on June 25, 2002, that she had not agreed to settle her case against the Grand Chapter. Noting her desire to proceed to trial and referencing Mr. Marshall's demand for an additional $15,000 from each client, Mrs. Wormack further stated that she felt that Mr. Marshall was "threatening Ms. Harris and I, but I will have my day in court." Ex. 43.

On July 8, 2002, Mr. Marshall sent the settlement agreement to Mr. and Mrs. Harris and requested they sign and return the document as soon as possible. They did not do so. On July 23, 2002,

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[6] The original fee agreement provided for a flat fee unless the lawyer and the clients "otherwise agreed."

Mrs. Harris wrote Mr. Marshall, indicating she felt she was being threatened and asking how Mr. Marshall could "demand my signature on a document which is not truthful." She further stated, "I totally disagree with you [sic] hearing and finalization of this case." Answering Br. of WSBA, App. A at 22 (Am. Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation (AFFCL) 142) (alteration in original).

Mr. Marshall responded in a July 31, 2002 letter that it was his "understanding that you each have settled your case." Ex. 53. He also stated that "[d]espite your reluctance to sign the Settlement Agreement, your claims have been dismissed and will not be heard at trial." *Id.* However, Mrs. Wormack's and the Harris' claims against the Grand Chapter had not been dismissed as of that date.

In August 2002, the Grand Chapter filed a motion to compel Mrs. Wormack and Mr. and Mrs. Harris to execute a settlement agreement with the Grand Chapter.[7] Mr. Marshall did not oppose the motion, although he had opposed a similar motion filed against those clients that agreed to pay

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[7] There is evidence Mr. Marshall had sent Mr. Thomson, the attorney for the Grand Chapter, a copy of his July 31 letter to his clients. Transcript of Proceedings (Tr.) (Feb. 20, 2007) at 166. Mr. Thomson testified that Mr. Marshall recommended he should bring the motion to compel settlement. Tr. (Feb. 20, 2007) at 84-85, 122-26. However, these facts were not found by the hearing officer.

additional fees. Mrs. Wormack wrote to the court attempting to oppose the motion pro se.

In September 2002, the Grand Chapter non-suited its claims. On January 17, 2003, Mr. Marshall wrote to Mrs. Harris. He now told her that she remained a plaintiff in the Rheubottom litigation and inquired whether she was interested in pursuing her claims at trial. Mrs. Harris responded three days later via letter indicating she was "still interested in this case to the same extent that I shared with you in previous conversations," but indicated that her "husband's heath will not allow me to make any effort to pay additional funds to you." Ex. 68. In response, Mr. Marshall wrote Mrs. Harris on January 21, 2003, that "[i]n order for me to proceed to trial on your behalf, you will need to forward a check to me in the amount of $15,000.00 by Thursday, January 23, 2003." Ex. 69. Although Mr. Marshall claimed this payment was for costs, his costs after January 21, 2003, through the completion of trial totaled $53.92.[8] Mrs. Harris did not pay Mr. Marshall any additional fees.

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[8] The hearing officer found Mr. Marshall had incurred $14,523.10 in costs in the Rheubottom litigation as of June 5, 2002. Between June 5, 2002, and January 21, 2003, he had incurred approximately $4,300 in costs and was likely to incur less than $500 in additional costs regarding the Rheubottom litigation.

Mrs. Richard's Fee Agreement

During this time, Mr. Marshall was also billing Mrs. Richard on an hourly basis. She initially paid him $1,000 on June 13, 2002. Ex. 40. The hearing officer found this payment to be an advance fee deposit. Mr. Marshall did not deposit the $1,000, or any portion thereof, to his client trust account.[9] Over the next few months, Mr. Marshall issued four additional invoices to Mrs. Richard. On January 16, 2003, Mrs. Richard and her husband met with Mr. Marshall and discussed his legal fees. On that date Mrs. Richard had paid all invoices from Mr. Marshall in full. Mr. Marshall agreed to complete the representation of Mrs. Richard for a flat fee of an additional $5,000. He also agreed to prepare an amended fee agreement. However, he never prepared the amended fee agreement.

On January 27, 2003, Mrs. Richard sent a $5,000 cashier's check to Mr. Marshall's office. Along with the payment, Mrs. Richard included a handwritten note indicating it was "for Retainer completing the PHGC case. Per your agreement on 1/16/03." Ex. 70. The check was deposited in the client trust account.

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[9] Mr. Marshall issued Mrs. Richard an invoice the same day, charging her for $900 in legal services and reflecting a $900 payment. Ex. 41. Over the next few months, the additional $100 remaining from Mrs. Richards' initial $1,000 payment did not show up on any invoices. However, the amount did show as a credit to her account on November 1, 2002. Ex. 81.

In March 2003, Mr. Marshall represented Mrs. Rheubottom and Mrs. Richard at the trial in the Rheubottom lawsuit. He did not represent Mrs. Wormack or Mrs. Harris, who still declined to pay his additional fees. The jury awarded $3,500 each to Mrs. Rheubottom and Mrs. Richard.

Although Mr. Marshall had agreed to represent Mrs. Richard for the $5,000.00 flat fee, he sent Mrs. Richard an invoice dated April 1, 2003, charging her $21,787.50 for professional legal services between March 10, 2003 and March 29, 2003. Ex. 74. Through a different attorney, Mrs. Richard challenged the invoice by stating her position that the $5,000.00 payment in January constituted full payment of Mr. Marshall's fees. Ex. 75. Mr. Marshall filed an attorney's lien for $21,787.50. Ex. 76. Two days after that, he filed a lawsuit against Mrs. Richard for $21,787.50 in fees. Ex. 77. Later that month, he removed Mrs. Richard's $5,000.00 payment from his trust account. AFFCL 76. Finally, in August 2004, after Mrs. Richard filed a grievance against him, Mr. Marshall dropped his lawsuit against Mrs. Richard. AFFCL 77.

Procedural History

On May 20, 2003, Mrs. Richard filed a grievance against Mr. Marshall.[10] Nearly two years later, the

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[10] By letter dated June 16, 2003, the WSBA requested a response to Mrs. Richard's grievance. Between that date and

(Continued on following page)

WSBA filed a formal complaint against Mr. Marshall charging him with 12 counts of violating the RPCs.[11] In total, the WSBA alleged Mr. Marshall violated nine different rules of professional conduct, including multiple violations of some of those rules.[12]

Teena Killian was appointed hearing officer. On May 25, 2006, the WSBA announced it was accepting applications for the position of disciplinary counsel. On June 1, 2006, after a new scheduling order was agreed upon, disciplinary counsel Christine Gray learned that Ms. Killian had applied for the disciplinary counsel position. She telephoned Mr. Marshall's counsel, Mr. Bulmer, and informed him that she would join in a request that Ms. Killian recuse herself. On June 22, 2006, the parties moved jointly for Ms. Killian's recusal and Ms. Killian recused. Mr. Marshall sought to have orders entered by Ms. Killian vacated. The WSBA agreed and the orders were vacated.

March 1, 2005, Mr. Marshall failed to respond to the WSBA requests in some manner. Over the course of that time, the WSBA filed multiple subpoenas in order to obtain the necessary information.

[11] The original complaint alleged 9 charges. The amended complaint alleged 12. Ex. 119.

[12] The WSBA alleged Mr. Marshall violated former RPCs 1.2(a), 1.5(a), 1.7(b), 1.14(a), 1.14(b)(3), 8.4(a), 8.4(c), 8.4(d), and 8.4(*l*). Unless otherwise indicated, all references to the RPCs are to the rules in effect before the September 1, 2006, amendments.

On August 10, 2006, chief hearing officer James M. Danielson appointed himself hearing officer. He did so after two other hearing officers were removed after challenges. All subsequent rulings were made by Mr. Danielson. Mr. Marshall never sought to disqualify Mr. Danielson until after Mr. Danielson announced his recommendation against Mr. Marshall.

After a disciplinary hearing on February 20-27, 2007,[13] the hearing officer issued findings of fact and conclusions of law. The hearing officer found Mr. Marshall had violated the RPCs in 9 of the 12 counts, while dismissing counts 6, 7, and 12. The hearing officer recommended that Mr. Marshall be disbarred.

On May 10, 2007, this court issued its decision in Marshall's other disciplinary action. *In re Disciplinary Proceeding Against Marshall,* 160 Wn.2d 317, 157 P.3d 859 (2007). The Board entered an order modifying three findings of fact. In all other respects, the hearing officer's findings of fact and conclusions of law were affirmed. The Board unanimously recommended that Mr. Marshall be disbarred.

ANALYSIS

Mr. Marshall assigns error to 65 of the hearing officer's findings. He also assigns error to 10 of the hearing officer's conclusions of law, as well as the

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[13] Amended findings and conclusions with the same recommendation were entered on March 29, 2007.

recommended sanction of disbarment. He disputes any finding in which the hearing officer found he acted knowingly or that his testimony was not credible. Additionally, he argues his due process rights were violated.

We outlined the standard of review in Mr. Marshall's previous disciplinary action before this court. *Id.* at 329-30. The ultimate responsibility for lawyer discipline in Washington rests with this court. *Id.* at 329 (citing *In re Disciplinary Proceeding Against Cohen,* 150 Wn.2d 744, 753-54, 82 P.3d 224 (2004) (*Cohen II*)). Nevertheless, "we give considerable weight to the hearing officer's findings of fact." *Id.* at 329-30. "Unchallenged findings of fact are treated as verities on appeal." *Id.* at 330 (citing *In re Disciplinary Proceeding Against Longacre,* 155 Wn.2d 723, 735, 122 P.3d 710 (2005)). Where, as here, findings of fact are challenged, we will uphold the hearing officer's findings if they are supported by substantial evidence. *Id.* (citing *In re Disciplinary Proceeding Against Poole,* 156 Wn.2d 196, 208, 125 P.3d 954 (2006)).

When an attorney challenges findings of fact, he must present argument as to why specific findings are unsupported and cite to the record to support the argument. *Id.* at 331 (citing *In re Disciplinary Proceeding Against Kronenberg,* 155 Wn.2d 184, 191, 117 P.3d 1134 (2005)). It is not sufficient for the attorney to merely argue his version of the facts while ignoring the testimony of other witnesses. *Id.* We will give great weight to the hearing officer's evaluation of

the credibility and truthfulness of the witnesses. *Id.* at 330. And we will not overturn findings of fact based merely on alternative explanations or versions of the facts rejected by the hearing officer and board. *Id.* at 331 (citing *Poole*, 156 Wn.2d at 212).

We review each of Mr. Marshall's challenges to the hearing officer's conclusions of law de novo and will uphold them if they are supported by the findings of fact. *Id.* The WSBA must prove misconduct by a clear preponderance of the evidence. *Id.* at 330. We generally uphold the hearing officer's ultimate conclusion relating to any misconduct "if it is supported by substantial evidence in the record that the lower court could reasonably have found would meet the clear preponderance standard." *Id.* We reserve the right to determine how much weight to give the hearing officer's findings in arriving at the presumptive sanction. *In re Disciplinary Proceeding Against Eugster,* 166 Wn.2d 293, 320, 209 P.3d 435 (2009). The clear preponderance standard requires more proof than simple preponderance, but less than beyond a reasonable doubt. *Marshall,* 160 Wn.2d at 330 (citing *Poole,* 156 Wn.2d at 209). "Substantial evidence is evidence sufficient 'to persuade a fair-minded, rational person of the truth of a declared premise.'" *Id.* (internal quotation marks omitted) (quoting *Poole,* 156 Wn.2d at 209 n.2). Our substantial evidence review takes into account the clear preponderance burden of proof. *Id.*

A. Due Process Arguments

Mr. Marshall initially requests that his case be dismissed or that he receive a new hearing based on two due process arguments. First, he complains that he did not receive a fair hearing based on alleged bias on the part of the hearing officer. Second, he argues that the amended complaint did not put him on notice as to the specific conflict of interest violations he would have to defend against. Both claims are without merit.

1. *Hearing Officer*

Mr. Marshall contends that his due process rights were violated when chief hearing officer James Danielson appointed himself hearing officer. He cites the Code of Judicial Conduct (CJC) arguing "[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. . . ." CJC Canon 3(D)(1).

Mr. Marshall bases his argument primarily on ELC 2.6, "Hearing Officer Conduct." He admits that ELC 2.5(f) contemplates that the chief hearing officer (CHO) may act as a hearing officer in disciplinary proceedings. However, he argues the rule is not intended to allow the CHO to do so when it will create a clear question of his impartiality and the fairness of the proceedings. ELC 2.6(e)(4)(A).

Mr. Marshall has three complaints regarding Mr. Danielson. First, he argues Mr. Danielson knew

that the first hearing officer, Ms. Killian, had applied for a job with the WSBA. Second, he argues Mr. Danielson received an annual salary from the WSBA and participated in WSBA committees. Third, he argues Mr. Danielson showed bias by refusing some of Mr. Marshall's requests for discovery and testimony. Mr. Marshall believes these considerations require that the charges against him be dismissed or that he receive a new hearing. Neither course of action is necessary here.

Mr. Marshall's complaint concerning Ms. Killian is unfounded. Once the disciplinary counsel discovered Ms. Killian had applied for a position with the WSBA, she informed Mr. Marshall and suggested recusal. All rulings made by Ms. Killian were vacated. Any potential harm caused by the conflict of interest was remedied by the recusal. Mr. Danielson's failure to inform Mr. Marshall of Ms. Killian's job application, assuming he even knew, did not disqualify him as a hearing officer.

Mr. Marshall's argument that Mr. Danielson's involvement with the WSBA created an appearance of fairness problem is also insupportable. After Ms. Killian recused, Mr. Danielson appointed two other hearing officers but each was disqualified. Only then did Mr. Danielson appoint himself. Mr. Marshall argues that doing so was inappropriate due to Mr. Danielson's annual salary from the WSBA and his participation in WSBA committees.

Mr. Danielson's salary does not bias him any more than the salary paid to any judge that hears cases brought by the State of Washington. Additionally, Mr. Danielson's involvement and discussions relating to improving hearing officer performance does not show bias or the appearance of unfairness. ELC 2.6(e)(4) provides a nonexclusive list of examples in which a hearing officer should be disqualified.[14] The facts surrounding Mr. Danielson's involvement in Mr. Marshall's disciplinary proceeding do not rise to the level requiring recusal.

Finally, Mr. Marshall fails to make a compelling argument that any of Mr. Danielson's adverse rulings were the result of bias or prejudice. We hold there is no cause to dismiss or remand for a new hearing.

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[14] The list includes instances in which "(i) [t]he hearing officer has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (ii) [t]he hearing officer previously served as a lawyer or was a material witness in the matter in controversy, or a lawyer with whom the hearing officer previously practiced law served during such association as a lawyer concerning the matter, or such lawyer has been a material witness concerning it; (iii) [t]he hearing officer knows that, individually or as a fiduciary, the hearing officer . . . has an economic interest in the subject matter in controversy or in a party to the proceeding, or is an officer, director or trustee of a party or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification." ELC 2.6(e)(4)(A).

2. *Amended Complaint*

Mr. Marshall claims the amended formal complaint was insufficient in regard to the conflict of interest charge. He argues it failed to inform him of the nature of the misconduct charged and did not allow him to prepare a defense.

As we noted in his previous disciplinary action, ELC 10.3(a)(3) states: "'[t]he formal complaint must state the respondent's acts or omissions in sufficient detail to inform the respondent of the nature of the allegations of misconduct.'" *Marshall,* 160 Wn.2d at 340 (alteration in original). In attorney discipline cases, due process requires that Mr. Marshall "'be notified of clear and specific charges and . . . be afforded an opportunity to anticipate, prepare, and present a defense.'" *Id.* (alteration in original) (quoting *In re Disciplinary Proceeding Against Romero,* 152 Wn.2d 124, 136-37, 94 P.3d 939 (2004)).

Specifically, Mr. Marshall takes issue with the hearing officer's finding of fact 21(c).[15] He complains the amended complaint did not put him on notice to defend himself against the specific findings ultimately made by the hearing officer.

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[15] The conflicts issues ranged from how costs of the litigation would be allocated among, now, five clients; how global settlement proposals would be dealt with if one client wanted to settle and others did not; and how the different agendas of Mrs. Harris and Mrs. Wormack would be reconciled.

Mr. Marshall was properly notified of the charges against him regarding conflict of interest violations. In its first amended formal complaint, the WSBA alleged "Mrs. Wormack objected to having Mrs. Harris join the Rheubottom litigation" and Mr. Marshall "knew that Mrs. Wormack objected to having Mrs. Harris join the Rheubottom litigation." Ex. 119, at 2. The WSBA also alleged Mr. Marshall failed to explain the implications and risks of common representation and that he failed to obtain consent in writing from his clients. *Id.* at 3. Further, the WSBA specifically charged Mr. Marshall, on account of these actions, of violating former RPC 1.7(b). *Id.* Mr. Marshall had every opportunity to anticipate, prepare, and present a defense. He was afforded due process. Accordingly, we deny Mr. Marshall's motion for dismissal or a new hearing as he has failed to show any due process violations.

B. Findings of Fact

We next determine whether the hearing officer's findings of fact are supported by substantial evidence. Mr. Marshall makes numerous objections to the findings of fact. None of his claims show the clear preponderance standard was not met. In the end, many of the findings of fact are the result of a credibility determination by the hearing officer. Considering we give great weight to the hearing officer's evaluation of the credibility and veracity of the witnesses he observes first hand, there is not enough evidence to overturn the hearing officer.

Mr. Marshall's dispute with the hearing officer's findings of fact can be categorized into three general topics: fees, settlement, and conflict of interest.

1. *Fees*

There are three separate fee agreements at issue. The first is Mr. Marshall's flat fee agreement with Mrs. Wormack and Mrs. Rheubottom. The second is the flat fee agreement with Mrs. Harris. These two agreements and the accompanying facts can be analyzed together as they are substantially similar. The third agreement is between Mr. Marshall and Mrs. Richard and was hourly.

a. Wormack/Rheubottom Fee Agreement and Harris Agreement

On October 4, 2000, Mr. Marshall entered into a fee agreement with Mrs. Wormack and Mrs. Rheubottom. The agreement had three relevant components. First, the clients were required to pay all reasonable costs, which could be advanced by Mr. Marshall, requiring reimbursement by the clients. Second, the clients would be required to pay "a $15,000 nonrefundable fee." Third, Mr. Marshall would "make no further charge for [his] services other than as set forth in this agreement or unless otherwise agreed." Ex. 3.

Mrs. Rheubottom and Mrs. Wormack paid Mr. Marshall the full $15,000.[16] The fee agreement with Mrs. Harris was substantially similar, with a charge of $7,500. Mrs. Harris paid the $7,500. Ex. 9.

In June 2002, Mr. Marshall was holding $12,500 for each of his clients involved in the first settlement with the named defendants. After the subsequent settlement conference with the Grand Chapter on June 3, 2002, Mr. Marshall informed Mrs. Rheubottom, Mrs. Harris, and Mrs. Wormack that they would have to pay additional fees for him to continue the case.

In his initial answer to the WSBA's amended formal complaint, Mr. Marshall admitted that he told Mrs. Rheubottom, Mrs. Wormack, and Mrs. Harris they would have to pay him additional fees. Ex. 120.[17] He now contends that he was not asking for fees, but costs.

There is nothing in the record to indicate Mr. Marshall was attempting to collect this money for costs. First, nothing in the agreements provided for a cost advance by the clients. Instead, the agreement specifically provided that Mr. Marshall could advance costs to be repaid by the clients. Second, the total

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[16] Mrs. Rheubottom paid $11,500 and Mrs. Wormack paid $3,500. Ex. 4.

[17] Mr. Marshall contends that although he did admit to this fact in his answer, it was disputed in the hearing and litigated by both parties.

costs billed to all of Mr. Marshall's clients after June 5, 2002, which included the trial, was only $4,391.41.[18] If Mr. Marshall is to be believed, he was demanding $30,000.00 for a cost advance from Mrs. Wormack and Mrs. Harris, not including the $15,000.00 he received from Mrs. Rheubottom. Third, Mrs. Wormack's letters to Mr. Marshall indicate she believed he was demanding an additional fee to finish the work he had already agreed to do under the flat fee agreement. *See* Exs. 43 & 51.

Once Mrs. Wormack and Mrs. Harris declined to pay him more fees, Mr. Marshall attempted to coerce them into a settlement. Mrs. Wormack was forced to represent herself when the Grand Chapter filed a motion to compel settlement. However, Mr. Marshall defended the other two clients who had paid additional fees. Mr. Marshall was willing to represent Mrs. Wormack and Mrs. Harris at trial only if they paid him an additional $15,000.

Mr. Marshall presents no compelling reason to depart from the hearing officer's finding that he was requesting additional fees rather than costs. Once Mr. Marshall asked for additional fees and did not receive them, his representation of Mrs. Wormack and Mrs.

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[18] From start to finish, for all clients, Mr. Marshall billed $18,914.51 for costs. Ex. 78-81. Of that amount, over $4,400 were fees paid for contract workers that Mr. Marshall hired to do the work his clients believed he would be doing. Ex. 48.

Harris stopped.[19] The hearing officer's findings of fact in relation to Mr. Marshall's demands for additional fees are supported by substantial evidence.

b. Mrs. Richard Fee Agreement

Unlike Mr. Marshall's other clients, Mrs. Richard was billed on an hourly basis. Mrs. Richard paid an initial retainer of $1,000 and was billed at an hourly rate of $175 per hour. Mrs. Richard had paid all of her invoices as of January 16, 2003. Mrs. Richard testified that on January 16, 2003, prior to trial, she met in Mr. Marshall's office and agreed to pay him a "flat fee" of $5,000 to "finish the case." 2 Tr. (Feb. 21, 2007) at 286-92. Mr. Richard, who was waiting outside when this agreement was reached, also testified that he subsequently asked Mr. Marshall why they needed to pay an additional $5,000 and Mr. Marshall responded it was to finish the case. 2 Tr. (Feb. 21, 2007) at 337. Mrs. Richard sent Mr. Marshall a $5,000 cashier's check with an accompanying handwritten note. The note stated that the check was "for retainer completing the PHGC case." Ex. 70. Likewise, the receipt Mrs. Richard received from Mr. Marshall said "non-refundable retainer." Ex. 71. However, after the trial, Mr. Marshall billed Mrs.

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[19] On the first morning of trial, when confronted with a defense motion to dismiss with prejudice for failure to participate in pretrial procedures, Mr. Marshall, at the suggestion of the trial judge, attempted to preserve the claims of Mrs. Wormack and Mrs. Harris by taking a voluntary nonsuit.

Richard an additional $21,787.50. When she refused to pay he filed a lawsuit and lien against her.

Mr. Marshall refers to his own testimony that the $5,000 payment was not to finish the case. He claims there is no evidence that he ever saw the note accompanying the $5,000 indicating it was to complete the PHGC case. However, he testified at the hearing that "[i]t would generally be the practice for my office to give me a copy of that." 3 Tr. (Feb. 22, 2007) at 593.

The handwritten note indicating the $5,000 check was for the purpose of completing the case supports the testimony of Mr. and Mrs. Richard. The hearing officer found Mr. Marshall's testimony to be not credible. Accordingly, the hearing officer's findings of fact in regard to the $5,000 fee are supported by substantial evidence.

2. *Settlement*

On June 3, 2002, Judge Michael Heavey held a settlement conference involving Mr. Marshall's clients and the Grand Chapter. At some point during or after the conference, Mrs. Wormack and Mrs. Harris signed two handwritten documents. The first document indicated Mrs. Wormack and Mrs. Harris apologized "for any acts that were perceived to be a violation of the Bylaws and Constitution of the [Grand Chapter]." Ex. 242. The document also stated, "We hope that the process of healing will begin now." *Id.* The other document signed by Mrs. Wormack and

Mrs. Harris noted "[i]t is time now to lay this matter to rest and reconcile our differences." *Id.*

The facts appear to indicate that most, if not all, of those present believed some settlement was intended. The hearing officer so found. However, there is no dispute that a written settlement agreement was never signed by any of the clients and no written stipulation was executed. At some point after the settlement conference, Mrs. Wormack and Mrs. Harris decided they would not agree to settle, which each confirmed by letter. *See* Exs. 43, 51.

On June 17, 2002, Mr. Marshall wrote a letter to his four clients that participated in the settlement conference: Mrs. Wormack, Mrs. Harris, Mrs. Rheubottom, and Mrs. Richard. The letter stated in part:

> The court has directed Ms. Wormack and Ms. Harris sign the release and settlement agreement and the Chapter to do the same in order to consummate this matter. If the parties do not sign then the Chapter will have the right to bring a motion to enforce these documents and ask for attorney's fees and costs. Given that Judge Heavey has confirmed that the settlement was consummated, Judge Katherine Shaffer may well impose attorney's fees against Ms. Wormack and Ms. Harris if the aforementioned documents are not executed.

Ex. 42. By July 23, 2002, both Mrs. Wormack and Mrs. Harris had refused to sign the agreement and

indicated, unequivocally, they were not interested in the settlement. On July 31, 2002, Mr. Marshall wrote Mrs. Wormack and Mrs. Harris a letter indicating it was his understanding that they had settled and concluded his letter: "Despite your reluctance to sign the Settlement Agreement, your claims have been dismissed and will not be heard at trial." Ex. 53.

The Grand Chapter's counsel, Terry Thomson, filed a motion to compel Mrs. Wormack and Mrs. Harris to execute the settlement agreement. Mr. Marshall wrote the two women and indicated he would not oppose the motion. This letter was written on August 15, 2002, after Mr. Marshall had received letters from both Mrs. Wormack and Mrs. Harris informing him that they did not wish to settle.[20] Ex. 56.

The evidence shows Mr. Marshall attempted to deceive Mrs. Wormack and Mrs. Harris in order to get them to settle their claims against the Grand Chapter. As part of the disciplinary proceeding against Mr. Marshall, Mr. Thomson testified that the court never directed Mrs. Wormack, Mrs. Harris, the Grand Chapter, or any of the parties to sign a settlement agreement. He also testified that Mrs. Wormack's and Mrs. Harris's claims had not been

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[20] Mr. Marshall handled the same claims against his other clients who paid him in a very different manner. He wrote to the court arguing that "none of the attorneys appeared in open court and dictated any purported terms of any settlement agreement on the record or in the presence of the Clerk." Ex. 39.

dismissed. The claims were still pending when the case went to trial the following year. No order of dismissal appears on the docket. Additionally, Mrs. Wormack testified that the court never directed her to sign a settlement agreement.

Mr. Marshall attempts to excuse his actions primarily as inartful drafting.[21] Br. of Appellant at 21. He claims Judge Heavey met with him and the Rheubottoms sometime after the settlement conference. He claims the judge directed him to have his clients sign the release documents and return them to Mr. Thomson. His only support for this contention is his own testimony. He also cites an e-mail from Judge Heavey to Judge Shaffer. Ex. 84. However, the e-mail supports only the conclusion that the judge believed the case was settled in regard to some of the parties, not that he was ordering the parties to sign anything.[22]

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[21] He claims he should have used the word "settled" instead of "dismissed."

[22] The e-mail stated:

> I thought the matter was settled Monday night. Because the terms were simple and the lateness of the hour I did not write out a quick CR2A agreement. My mistake, although I am not sure now that they all would have signed it.
>
> I met with them all this morning. They are in good faith and I don't believe that there are any improprieties going on.

Ex. 84.

Finally, Mr. Marshall states in his brief that when he "understood that Mrs. Wormack's and Mrs. Harris decided they did not want to settle, he sent them letters to advise them to contact him regarding their right to proceed to trial." Appellant's Br. at 21. The two letters he cites, however, were written in January of 2003, six months later and shortly before trial.

The hearing officer's findings of fact surrounding the settlement conference and Mr. Marshall's attempt to deceive his clients are supported by substantial evidence. Mr. Marshall's letters, written after his clients refused to pay additional fees, were misleading and threatening.[23] Additionally, the testimony of Mrs. Wormack and Mr. Thomson, as well as the letters themselves, supports the findings of fact.

3. *Conflict of Interest*

The hearing officer found that Mrs. Wormack objected both orally and in writing to Mr. Marshall about Mrs. Harris becoming a party to the Rheubottom litigation. The hearing officer further found that Mr. Marshall knew that this objection created a conflict of interest that would preclude his

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[23] After receiving Mr. Marshall's June 17, 2002 letter, Mrs. Wormack responded, "I feel that you are threatening Ms. Harris and I." Ex. 43. She had spent the first portion of her letter rejecting Mr. Marshall's claim that she had settled and rejecting his demand for additional fees should the case not be settled. *Id.*

continuing to represent both, absent a waiver. The hearing officer found this same conflict when Mr. Harris was added to the litigation.[24]

Mr. Marshall contends there was no direct conflict of interest or anything that created a significant risk of materially limiting his representation of any of the clients.[25] He further argues that unless actual conflicts of interest existed, there is no requirement that he obtain consent and written waivers pursuant to former RPC 1.7(b).

Mr. Marshall does not dispute that Mrs. Wormack objected to having Mrs. Harris included or that he failed to obtain a written consent. Mrs. Wormack testified that she had told Mr. Marshall multiple times in writing and orally that she objected to having Mrs. Harris added to the lawsuit because they had "totally different" agendas. Tr. (Feb. 20, 2007) at 145-48, 152. Her letters to Mr. Marshall unequivocally confirm this. *See* Exs. 10-11.

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[24] The hearing officer also found the issues regarding the conflict of interest ranged from how costs of the litigation would be allocated, how global settlement proposals would be dealt with if one client wanted to settle and others did not, and how the different agendas of Mrs. Harris and Mrs. Wormack would be reconciled.

[25] Mr. Marshall first complains that the bar failed to allege specific facts concerning what the conflict of interest was. He argues this was a violation of his due process rights. However, this is not a contention surrounding the findings of fact and will be dealt with later in the opinion.

One letter from Mrs. Wormack to Mr. Marshall is particularly illustrative. On March 3, 2001, she requested to withdraw from the Rheubottom litigation "because of the unethical client lawyer treatment" she received by Mr. Marshall's allowing Mrs. Harris to join the lawsuit against her wishes and not informing her that Mrs. Harris had been joined despite her objections. Ex. 11. She noted that Mrs. Harris had "a severe need to satisfy her vengeance" against a certain member of the Grand Chapter while Mrs. Wormack and Mrs. Rheubottom's interest was only "justice." *Id.* These facts indicate more than just a potential conflict of interest but an actual conflict, of which Mr. Marshall was fully aware.

Mr. Marshall's reply was that the two women resolved their differences and no other conflict of interest existed. Br. of Appellant at 27. Even if true, he still failed to obtain a written waiver. The hearing officer's finding that a conflict of interest existed is supported by substantial evidence. The hearing officer's finding that Mr. Marshall failed to obtain consent in writing from any of his clients is supported by substantial evidence.

C. Conclusions of Law

The hearing officer issued conclusions of law in regard to each charged count of misconduct. In each of the counts discussed below, the hearing officer found Mr. Marshall acted knowingly and was unimpaired. The hearing officer also found Mr.

Marshall's actions caused injury or potential injury. We use the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991 ed. & Supp. 1992) (ABA Standards) as our guide. A lawyer acts with "knowledge" "'when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result.'" *In re Disciplinary Proceeding Against Stansfield*, 164 Wn.2d 108, 123, 187 P.3d 254 (2008) (quoting ABA Standards at 6).

1. *Count 1 – Additional Fees*

In count 1, the hearing officer concluded that Mr. Marshall violated former RPC 1.5(a), 8.4(a), and 8.4(c) by requesting and/or receiving additional fees from Mrs. Wormack and Mrs. Harris for representation that had already been paid for under a flat fee agreement.

The hearing officer's conclusions of law in regard to count 1 are supported by substantial evidence. Mrs. Wormack and Mrs. Harris agreed to a flat fee for representation. Once Mr. Marshall had the $12,500 settlement checks from the earlier settlement, and once Mrs. Wormack and Mrs. Harris declined to accept the Grand Chapter settlement offer, Mr. Marshall demanded additional fees in order to continue his representation. He did this despite the agreement's terms, which contemplated that the case may go to trial. Additionally, Mrs. Wormack and Mrs.

Harris were paying for all costs associated with the litigation and were up to date on all payments. These facts support the conclusion that Mr. Marshall violated former RPC 1.5(a), 8.4(a), and 8.4(c), and did so knowingly.

2. *Count 2 – Conflict of Interest*

In count 2, the hearing officer concluded that Mr. Marshall violated former RPC 1.7(b) when he agreed to represent Mrs. Harris over the objection of Mrs. Wormack, and later agreed to represent Mr. Harris without obtaining consent in writing from Mrs. Wormack, Mrs. Harris, and Mr. Harris.[26] Mr. Marshall knew of the conflict of interest from both oral and written communications from Mrs. Wormack.

Under former RPC 1.7(b), representation of multiple clients in a single matter requires that the attorney explain the implications of the common representation and the risks involved. This "rule assumes that multiple representation will necessarily require consultation and consent in writing. . . ." *Marshall*, 160 Wn.2d at 336.

The hearing officer's conclusions of law in regard to count 2 are supported by substantial evidence. Mr. Marshall admits that he was aware of a conflict of interest and yet he still agreed with Mrs. Harris to

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[26] The hearing officer dismissed the allegations as to Mr. and Mrs. Rheubottom and Mrs. Richard.

represent her in the Rheubottom litigation. At no point did Mr. Marshall explain the potential problems or obtain a written waiver. These facts support the conclusion that Mr. Marshall violated former RPC 1.7(b).

3. *Count 3 – Misleading Statements to the WSBA*

In count 3, the hearing officer concluded that Mr. Marshall violated former RPC 8.4(c), 8.4(d), and 8.4(*l*) by making a misleading statement to the WSBA that he had not requested attorney fees but only costs from Mrs. Wormack and Mrs. Harris.

The hearing officer's conclusions of law in regard to count 3 are supported by substantial evidence. The facts indicate Mr. Marshall was attempting to get his clients to pay him additional fees, and not costs. The hearing officer made a credibility determination, supported by substantial evidence, that Mr. Marshall knowingly misled the WSBA. These facts support the conclusion that Mr. Marshall violated former RPC 8.4(c), 8.4(d), and 8.4(*l*).

4. *Count 4 – Richard Fee Agreement*

In count 4, the hearing officer concluded Mr. Marshall violated former RPC 1.5(a) when he agreed to complete Mrs. Richard's case for a flat fee, then billed her $21,787.50, and filed a lawsuit against her in an attempt to collect the fee, as well as filing a lien

against Mrs. Richard's award in the Rheubottom litigation.

The hearing officer's conclusions of law in regard to count 4 are supported by substantial evidence. The facts supporting the hearing officer's conclusion include testimony of Mr. and Mrs. Richard and the handwritten note accompanying Mrs. Richard's $5,000 check indicating it was to "finish the case." Ex. 71. These facts support the conclusion that Mr. Marshall violated former RPC 1.5(a), and did so knowingly.

5. *Count 10 -- Settlement Misrepresentations*

In count 10, the hearing officer concluded Mr. Marshall violated former RPC 8.4(c) by making one or more misrepresentations in his letters of June 17, 2002, and July 31, 2002 (trying to compel settlement).

The hearing officer's conclusion of law in regard to count 10 is supported by substantial evidence. Mr. Marshall unequivocally attempted to deceive Mrs. Wormack and Mrs. Harris into believing that they were required to settle their case with the Grand Chapter once they informed Mr. Marshall they would not pay an additional fee. His clients continued to tell him they did not wish to settle. Mr. Marshall defended a motion to compel settlement on behalf of those clients who were willing to pay his additional fee. He declined to do so for the clients who would not. These facts support the conclusion that Mr. Marshall violated former RPC 8.4(c) and did so knowingly.

6. *Count 11 – Settlement*

In count 11, the hearing officer concluded Mr. Marshall violated former RPC 1.2(a) by failing to abide by the decision of Mrs. Wormack and Mrs. Harris to not settle their claims against the Grand Chapter and continuing to attempt to force a settlement contrary to his clients' wishes.

For the same reasons discussed in count 10, the hearing officer's conclusions of law in relation to count 11 are supported by substantial evidence.

D. Sanctions

We engage in a two-step process in order to determine the appropriate disciplinary sanctions. *In re Disciplinary Proceeding Against Cramer,* 165 Wn.2d 323, 339, 198 P.3d 485 (2008) (citing *In re Disciplinary Proceeding Against Cohen,* 149 Wn.2d 323, 338, 67 P.3d 1086 (2003)). To arrive at a presumptive sanction, we must examine the lawyer's conduct as a whole and in context. A single act of misconduct may violate more than one ethical duty. *Eugster,* 166 Wn.2d at 317. Using the ABA *Standards,* we first must determine the presumptive sanction by considering the ethical duty violated, the lawyer's mental state, and the extent of the actual or potential harm caused by the lawyer's misconduct. *Id.* Second, we consider any aggravating or mitigating facts that alter the presumptive sanction or affect the nature or length of the discipline to be imposed. *Id.* In order to determine the appropriate sanction, the sanctioning

body must take into account all four elements – ethical duty violated, lawyer's mental state, extent of actual or potential harm, and aggravating or mitigating factors. *Id.*

1. *Mitigating/Aggravating Factors*

The hearing officer found several aggravating factors: multiple disciplinary offenses, selfish motive, pattern of misconduct, deceptive practice, refusal to acknowledge the wrongful nature of conduct, and substantial experience in the practice of law. With the exception of the aggravating factor for refusal to acknowledge the wrongful nature of his conduct, Mr. Marshall makes only passing arguments disputing these aggravating factors.

a. Prior Disciplinary Offenses (ABA *Standards* std. 9.22(a))

Mr. Marshall does not dispute that he has multiple disciplinary offenses on his record. At the time of the disciplinary proceeding, this court had not yet made a decision in Marshall's earlier disciplinary action. *See Marshall,* 160 Wn.2d 317. However, the case was decided by the time the Board reviewed the hearing officer's recommendation. In total, Mr. Marshall has been disciplined on three different occasions including: (1) a 1989 admonition for failing to respond to the WSBA's requests for information; (2) a 1998 reprimand for conduct involving dishonesty, fraud, deceit, or misrepresentation; and (3) a 2007 18

month suspension for (a) "deceitful" conduct; (b) improperly charging contract attorney fees as "costs;" (c) failing to maintain complete records of client funds, failure to provide an appropriate accounting, and failing to remit client funds; (d) representing multiple clients without explaining the implications of common representation or obtaining their written consent; and (e) failing to abide by his clients' decisions.

The only mitigating factor found by the hearing officer was that Mr. Marshall's first admonition was in 1989 (remote). However, the hearing officer's finding of prior discipline is supported by substantial evidence.

b. Dishonest or Selfish Motive (ABA *Standards* std. 9.22(b))

The hearing officer found Mr. Marshall had a selfish motive in demanding additional fees from Mrs. Wormack and Mrs. Harris and in adding separately paying clients to the litigation without obtaining written consent from existing clients. Mr. Marshall counters by asking a rhetorical question of whether gaining clients and charging for services is not a selfish motive. He argues the hearing officer is confusing the business part of practicing law with the term "selfish motive."

However, a lawyer's service to his clients should be mutually beneficial. Mr. Marshall accepted Mrs. Harris as a client despite Mrs. Wormack's objection.

He also entered into a valid fee agreement with Mrs. Wormack and Mrs. Harris and then demanded that they pay him additional funds. Mr. Marshall's reasons for adding Mrs. Harris and charging his clients additional fees were for his own benefit, not for the benefit of his clients. The hearing officer's finding of selfish motive is supported by substantial evidence.

c. Pattern of Misconduct (ABA *Standards* std. 9.22(c))

The hearing officer found that Mr. Marshall reflected a pattern of misconduct by failing to respond to the WSBA's requests for information and failing to place funds in trust. Mr. Marshall offers no excuse for his conduct. The facts surrounding these claims were not briefed. In sum, the WSBA had to issue three separate subpoenas duces tecum due to Mr. Marshall's failure to timely and/or fully respond to the WSBA's requests for information. The hearing officer's finding is supported by substantial evidence.

d. Deceptive Practice (ABA *Standards* std. 9.22(f))

The hearing officer found Mr. Marshall engaged in a deceptive practice by attempting to characterize his requests for additional fees as costs both during deposition and during the disciplinary proceedings. The hearing officer found Mr. Marshall's testimony to not be credible. This finding, coupled with the finding

that Mr. Marshall was demanding additional fees and not attempting to cover future costs, supports the hearing officer's finding of a deceptive practice. Therefore, this finding is also supported by substantial evidence.

e. Refusal To Acknowledge Wrongful Nature of Conduct (ABA *Standards* std. 9.22(g))

We decline to find that this aggravating factor is supported by substantial evidence. Although Mr. Marshall has shown no penitence for his actions, we do not penalize him for making arguments in his defense. Nevertheless, there are more than enough aggravating factors to uphold the Board's unanimous decision.

f. Substantial Experience in the Practice of Law (ABA *Standards* std. 9.22(i))

Mr. Marshall does not appear to contest the hearing officer's finding that Mr. Marshall has substantial experience in the practice of law, having been admitted and practiced since 1986. We find this aggravating factor is supported by substantial evidence.

2. *Recommended Sanctions*

Count 1: Mr. Marshall knowingly violated former RPC 1.5(a), 8.4(a), and 8.4(c) when he requested

additional fees from Mrs. Wormack and Mrs. Harris for representation that had already been paid for under a flat fee agreement. The hearing officer noted Mr. Marshall's actions caused potential serious injury as to the loss of Mrs. Wormack and Mrs. Harris' legal claim. Additionally, the clients were actually injured by the fees they had paid to that point.

The hearing officer correctly applied ABA *Standards* std. 7.1. This standard provides:

> Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and cause[s] serious or potentially serious injury to a client, the public, or the legal system.

Taking into account the aggravating and mitigating circumstances, the hearing officer found no reason to depart from the presumptive sanction of disbarment. The Board unanimously agreed. We find no reason to depart from the recommendation.

Count 2: Mr. Marshall knowingly violated former RPC 1.7(b) by agreeing to represent Mrs. Harris over the objection of Mrs. Wormack, and later agreeing to represent Mr. Harris without obtaining consent in writing. Mr. Marshall knew a conflict of interest existed and failed to obtain a waiver or explain the implications of common representation. Despite Mrs. Wormack's objection, Mr. Marshall added Mrs. Harris to the lawsuit for his own benefit. The hearing officer

found this caused actual serious injury due to the lost fees they paid without written consent. Additionally, by having two clients with different agendas, there was the potential for injury in regard to settlement decisions and the focus of the litigation.

The hearing officer correctly applied ABA *Standards* std. 4.31(b). This standard provides:

> Disbarment is generally appropriate when a lawyer, without the informed consent of the client(s):
>
> . . . .
>
> (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

Taking into account the aggravating and mitigating circumstances, the hearing officer found no reason to depart from the presumptive sanction of disbarment. The Board unanimously agreed. We find no reason to depart from the recommendation.

Count 3: Mr. Marshall knowingly violated former RPC 8.4(c), 8.4(d), and 8.4(*l*) by making a misleading statement in his investigative deposition that he was not requesting attorney fees, but only costs from Mrs. Wormack and Mrs. Harris. The hearing officer found this caused injury or potential injury to Mr. Marshall's clients, the public, and the legal system.

The hearing officer correctly applied ABA *Standards* std. 7.2. This standard provides:

> Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

However, taking into account the aggravating and mitigating circumstances, including prior discipline for filing forged declarations, the hearing officer concluded that the recommended sanction should be disbarment. The Board unanimously agreed. We find no reason to depart from the recommendation.

Count 4: Mr. Marshall knowingly violated former RPC 1.5(a) by agreeing with Mrs. Richard to finish her case for a flat fee, and then billing her $21,787.50 and filing a lawsuit and a lien against her. The hearing officer found these actions caused actual serious injury to Mrs. Richard, including her need to hire a lawyer to defend herself.

The hearing officer correctly applied ABA *Standards* std. 7.1. This standard provides:

> Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and cause[s] serious or potentially serious injury to a client, the public, or the legal system.

Taking into account the aggravating and mitigating circumstances, the hearing officer found no reason to depart from the presumptive sanction and recommended disbarment. The Board unanimously agreed. We find no reason to depart from the recommendation.

Count 10: Mr. Marshall knowingly violated former RPC 8.4(c) when he made one or more misrepresentations in his letters of June 17, 2002, and July 31, 2002, attempting to coerce Mrs. Wormack and Mrs. Harris to settle their case with the Grand Chapter. This caused both potential and serious injury to his clients as Mr. Marshall was attempting to benefit himself by getting his clients' cases out of his office, contrary to their wishes, after they refused to pay him additional fees.

The hearing officer correctly applied ABA *Standards* std. 4.61. This standard provides:

> Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.

Taking into account the aggravating and mitigating circumstances, the hearing officer found no reason to depart from the presumptive sanction and recommended disbarment. The Board unanimously agreed. We find no reason to depart from the recommendation.

Count 11: Mr. Marshall knowingly violated former RPC 1.2(a) by failing to abide by the decision of Mrs. Wormack and Mrs. Harris to not settle their claims against the Grand Chapter and by continuing to force a settlement contrary to his clients' wishes. Mr. Marshall's actions caused potential and actual injury to his clients.

The hearing officer correctly applied ABA *Standards* std. 4.42(a). This standard provides:

> Suspension is generally appropriate when:
>
> > a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client.

However, taking into account the aggravating and mitigating circumstances, the hearing officer concluded that the recommended sanction should be disbarment. The Board unanimously agreed. We find no reason to depart from the recommendation.

3. *Hearing Officer's and Board's Recommendation*

The hearing officer and Board agreed Mr. Marshall should be disbarred. Additionally, the hearing officer recommended Mr. Marshall be ordered

to pay restitution of $7,500 to Mrs. Wormack and $7,500 to Mrs. Harris.[27]

4. *Proportionality*

Mr. Marshall argues the Board's recommended sanction is not proportionate to other similar cases. Under a proportionality review, the Board considers whether the recommended sanction is appropriate by comparing the case at hand with other similar cases in which the same sanction was approved or disapproved. *Cohen II*, 150 Wn.2d at 763. The Board takes into account all of the lawyer's misconduct, including his record of prior disciplinary offenses and prior similar misconduct. *In re Disciplinary Proceeding Against Anschell,* 141 Wn.2d 593, 616, 9 P.3d 193 (2000). Mr. Marshall bears the burden of proving that the recommended sanction is disproportionate. *In re Disciplinary Proceeding Against Kagele,* 149 Wn.2d 793, 821, 72 P.3d 1067 (2003).

Mr. Marshall fails to carry his burden of proving the recommended sanction is disproportionate. He cites primarily to two cases that resulted in a suspension and notes a number of others in two footnotes. *See In re Disciplinary Proceeding Against Egger,* 152 Wn.2d 393, 416-18, 420, 98 P.3d 477 (2004) (six

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[27] The hearing officer also recommended that $4,000 of the restitution for the benefit of Mrs. Wormack be paid in a joint check to Mrs. Wormack and Mrs. Rheubottom, or $4,000 paid to Mrs. Rheubottom and $3,500 to Mrs. Wormack.

month suspension for knowingly billing a client for work that was partially paid by third party and failing to obtain written consent for a potential conflict of interest); *In re Disciplinary Proceeding Against Gillingham,* 126 Wn.2d 454, 468, 896 P.2d 656 (1995) (60 day suspension for obtaining loan from client without proper safeguards, and drafting will in which lawyer is named as beneficiary).

These cases do not support a conclusion that the recommended sanction of disbarment is disproportionate. Mr. Marshall's history of previous violations, coupled with the multiple, serious violations before us now, are simply not comparable with the cases Mr. Marshall cites. Therefore, there is no reason to conclude the recommended sanction of disbarment is inappropriate.

CONCLUSION

Finding no reason to depart from the hearing officer's recommendation unanimously affirmed by the Board, we disbar Mr. Marshall and require him to pay restitution.[28] "We have 'adopted the standard . . . that the Board's recommendation should be affirmed unless this court can articulate a specific reason to

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[28] Mr. Marshall makes no specific argument as to why he should not have to pay Mrs. Wormack and Mrs. Rheubottom an amount equaling the initial retainer fee. Considering Mr. Marshall abandoned his clients prior to trial, such an award is justified. We therefore require Mr. Marshall to pay $7,500 each to Mrs. Wormack and Mrs. Rheubottom.

reject the recommendation.'" *In re Disciplinary Proceeding Against DeRuiz*, 152 Wn.2d 558, 572, 99 P.3d 881 (2004) (alteration in original) (quoting *In re Disciplinary Proceeding Against McLeod*, 104 Wn.2d 859, 865, 711 P.2d 310 (1985)). There is no reason to depart from the hearing officer's and unanimous Board's recommendation to disbar. Several of the violations, standing alone, warrant disbarment. When the violations are considered together, along with the substantial aggravating factors in this case, disbarment is the appropriate sanction.

Mr. Marshall attempted to squeeze his clients for additional fees despite the flat fee agreement. One of these clients was forced to obtain her own counsel to defend herself once Mr. Marshall filed a lawsuit and a lien against her. He tried to bully his clients into settling their claims, despite their express desire to proceed to trial. He declined to defend them from that point on, demanding they accept the settlement or pay him more money. Additionally, Mr. Marshall committed other violations supporting the Board's recommendation to disbar and has a history of violating the Rules of Professional Conduct. We therefore disbar Mr. Marshall in accordance with the hearing officer's and Board's unanimous recommendation and require him to pay restitution as set forth by the hearing officer.

/s/ J.M. Johnson, J.

WE CONCUR:

/s/ Alexander, C.J. /s/ Owens, J.

/s/ Johnson, J. /s/ Chambers, J.

/s/ Madsen, J. /s/ Stephens, J.

/s/ Sanders, J. /s/ Dwyer, J. P.T.

THE SUPREME COURT OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against BRADLEY ROWLAND MARSHALL, an Attorney at Law.	**CERTIFICATE OF FINALITY** NO. 200,577-2 BAR NO. 15830 (Filed Dec. 23, 2009)

This is to certify that the opinion of the Supreme Court of the State of Washington, filed on October 1, 2009, became final on December 23, 2009. Order Denying Motion for Reconsideration was entered herein on December 23, 2009, copy attached.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Olympia, Washington this 23rd day of December 2009.

/s/ Ronald R. Carpenter
RONALD R. CARPENTER
Clerk of the Supreme Court
State of Washington

cc: United States District Courts
United States Court of Appeals
Hon. William K. Suter
U.S. Supreme Court
United States Tax Court

Bradley Rowland Marshall
Scott G. Busby
Reporter of Decisions

THE SUPREME COURT OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against BRADLEY ROWLAND MARSHALL, an Attorney at Law.	**ORDER DENYING MOTION FOR RECONSIDERATION** No. 200,577-2 WSBA #15830 (Filed Dec. 23, 2009)

The Court having considered the Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Bradley Rowland Marshall's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 23rd day of December, 2009.

/s/ Gerry L. Alexander
CHIEF JUSTICE

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